STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FOUNTAIN VALLEY EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-2040
v.	)	PERB Decision No. 625
FOUNTAIN VALLEY ELEMENTARY SCHOOL DISTRICT,	)	June 23, 1987
Respondent.	)	

Appearances; A. Eugene Huguenin, Jr., Attorney for Fountain Valley Education Association, CTA/NEA; Parker and Covert by Margaret A. Chidester and Spencer E. Covert, Jr. for Fountain Valley Elementary School District.

Before Hesse, Chairperson; Porter and Craib, Members.

DECISION

PORTER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Fountain Valley Elementary School District (District or Respondent) to the attached proposed decision of a PERB administrative law judge (ALJ). The ALJ found that the District violated section 3543.5(c) and, concurrently, 3543.5(a) and (b) of the Educational Employment Relations Act (EERA or Act)[1] by changing the number of instructional

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references

minutes required to be taught at the first and second grade levels. We have reviewed the record and the proposed decision, the exceptions filed by the District, along with the various filings of the parties, and hereby adopt the proposed decision of the ALJ, consistent with the discussion herein.

FACTS

Having reviewed the exceptions of the District and the entire record in this case, we determine that the findings of fact in the proposed decision are free from prejudicial error and we therefore adopt them as the findings of the Board itself.

The Charging Party and the Respondent were parties to a collective bargaining agreement that was effective from July 1, 1982 through June 30, 1985. The agreement provided for reopening on the issues of salary and calendar, but any other topic could be reopened only by mutual consent of the parties. Article XVIII of the agreement, entitled "Completion of Meet and

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herein are to the Government Code. Section 3543.5 provides, in pertinent part, as follows:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

Negotiation," specified in relevant part:

> Except where specifically stated, during the term of this Agreement, the Association and the District expressly waive and relinquish the right to meet and negotiate . . . .

The agreement also specified that the bargaining unit members "shall work the following number of days: 175 instructional days." It further stated that:

> Bargaining unit members shall not be required to provide instruction for more than the following number of minutes per full five-day week (exclusive of lunch, breaks, etc.):
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> | | |
> |---|---|
> | Levels K | 1200 minutes |
> | Levels 1-2 | 1250 minutes |
> | Levels 3-8 | 1550 minutes |

Effective July 28, 1983, the Legislature passed the Hughes-Hart Education Reform Act of 1983, commonly referred to as Senate Bill 813, or SB 813. This act added sections 46200-46204 to the Education Code, and offered districts additional revenues as an incentive to increase the number of instructional minutes to a specified minimum number of minutes per year at each grade level and to increase the length of the instructional year to 180 days. Districts could phase in the increases in instructional minutes over three years, so long as, in each of the three years, they increased the minutes at each grade level by at least one-third the difference between the minutes they offered in 1982-83 and the specified total minutes in the statute. Acceptance of these incentive provisions of SB 813 was not mandatory.

To qualify for the incentive money for longer day and longer year in 1984-85, the District needed to increase the instructional year to 180 days for all grades and to increase the instructional minutes required at first and second grades by ten minutes per day in each of the three years. As a result of increasing the length of the instructional year to 180 days, the District achieved the SB 813 goals for number of minutes in all grade levels except grades one and two. Thus, once the District lengthened the instructional year, it qualified for the incentive money for increased minutes in every grade except grades one and two without the necessity of increasing the daily or weekly instructional minutes in other grades.

In February 1984, the Association submitted its salary proposal pursuant to the reopener language of the collective bargaining agreement. Commencing in March and throughout the spring, the District discussed with the Association its desire to renegotiate the length of the work year and instructional minutes, in order to reach the SB 813 levels. The Association made clear that it was unwilling to agree to renegotiate those provisions, at least until the salary issue was concluded. Ultimately, the parties went to impasse on the issue of salary. In August 1984, the District unilaterally adopted an increased instructional year that contained 180 student attendance days and increased the number of instructional

minutes at the first and second grade levels by 30 minutes per day, or from 1250 minutes per week to 1400 minutes. The District thus reached the SB 813 number of instructional minutes in all grade levels. The Association filed an unfair practice charge on the unilateral changes.

DISCUSSION

The ALJ's Proposed Decision

At the hearing below and on appeal, the District argues that it provided the Association notice and an opportunity to negotiate the changes in instructional year and number of minutes. The Association's refusal to negotiate, asserts the District, constituted a waiver, thereby excusing the District's unilateral action. The ALJ concluded that the contract clearly established a set number of instructional minutes at each grade level and established the length of instructional year for the duration of the agreement, unless both parties agreed to reopen a section for renegotiation. Thus, she concluded that the Association had a contractual right to refuse to reopen the minutes and work year provisions. Furthermore, she rejected the District's argument that the language in the management rights clause authorized the District to take its unilateral action, since she found that that provision specified that the exercise of management rights would be "limited only by the specific and express terms of this agreement, ..." The specific provisions of the contract concerning work year and

instructional minutes controlled and, thus, the management rights clause could not authorize the employer to take unilateral action on these issues. The ALJ further rejected the District's argument that, since the adoption of SB 813 was not within the contemplation of the parties at the time the contract was entered into, the District had not waived its right to renegotiate the work year/instructional minute provisions. The ALJ concluded that the District violated section 3543.5(c) when it unilaterally changed the required number of minutes of the school day, thereby lengthening the employees' hours of work.

The ALJ did find, however, that the District did not violate the Act in increasing the instructional year, since the District took the position that it did not intend to require teachers in the bargaining unit to work the additional days if the parties did not reach agreement prior the end of the teacher's contractual work year. Therefore, there was no demonstrated repudiation of the agreement with respect to an increase in the teacher work year.[2]

The ALJ ordered a return to the status quo for the first and second grades, effective the semester following the semester in which the decision becomes final. She also ordered a makewhole remedy for the first and second grade teachers, of

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[2]The Association did not except to this conclusion.

either monetary compensation or compensating time off in the amount of at least 30 minutes per day, plus whatever additional time or money the parties agreed upon to compensate for the additional preparation time resulting from the increased instructional time. In the absence of agreement, the ALJ concluded that the additional preparation time could be determined in a compliance proceeding. In addition, she ordered interest in the amount of ten percent per annum, the posting of an order and for the District to cease and desist from taking unilateral action. Finally, she concluded that the teachers at Oka School, who had voluntarily worked additional time in the 1983-84 school year, should likewise receive the additional compensation or compensating time off.

In its exceptions, the District asserts that the ALJ erred in refusing to allow testimony other than by way of an offer of proof concerning the District's attempts to bargain the longer day/longer year. While such an approach by the ALJ runs the risk of Board disagreement with the ALJ's determination of lack of relevancy, in this case we agree that such testimony was irrelevant, since the Association had no duty to negotiate, given the language of the contract.

Additionally, the District asserts that its unilateral action should be excused on the basis that the Association did not engage in salary negotiations in good faith. We find that whether the Association engaged in salary negotiations in good

faith is not at issue in this case, since even bad faith salary negotiations on the part of the Association would not have created a duty on its part to negotiate the District's longer day/longer year proposal. Absent that duty, no waiver by the Association can be found and the District's repudiation of the lawful negotiated agreement is not excused.

The majority of the remainder of the District's exceptions are reiterations of its arguments raised below, and we conclude that they were correctly analyzed and resolved by the ALJ.

While the District specifically does not assert a business necessity defense, it argues in essence that the policy behind the enactment of SB 813 should justify a finding that the Association was required to negotiate the increases, in order for the District to implement SB 813's provisions to increase the instructional minutes and school year and to receive the additional revenues. We do not disagree with the District's motives in attempting to negotiate the SB 813 changes; nor do we dispute the laudable goals of SB 813. Nonetheless, our responsibility in administering EERA is to make it possible for the parties to negotiate collective bargaining agreements in good faith and, once they have done so, to protect their right to rely on their agreements. When parties agree on a three-year contract with no reopeners except for salary, they run the risk that the Legislature may enact nonmandatory laws that alter the environment in which the agreement was reached.

Such was the case here. While the Association's position may not have met the District's educational concerns, the Association was, nevertheless, entitled to rely on the negotiated agreement.

Therefore, for the reasons expressed in the ALJ's proposed decision and the reasons set forth above, we conclude that the District violated EERA section 3543.5(c) by unilaterally changing the number of instructional minutes required to be taught by the first and second grade teachers of the District.

On the issue of the remedy, however, we reach the following conclusions. First, we take official notice of the terms of the successor collective bargaining agreement between the parties, effective April 23, 1986 through April 22, 1989.[3] This agreement reflects that the teachers in grades one and two are required to provide instruction for 1400 minutes per week. In light of this negotiated change in instructional minutes, it is no longer appropriate to order a return to the status quo ante. Further, we note that Education Code section 46201(c) imposes a financial penalty on districts that lower their instructional minutes below the SB 813 amounts. Therefore, we do not order a return to the status quo ante with respect to

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3PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq. Regulation section 32120 requires districts to file with the appropriate regional office a copy of their current collective bargaining agreement and any amendments thereto.

the instructional minutes.

Second, we believe it appropriate to order a remedy that effectuates the purposes of the Act and is sufficiently clear to enable the respondent to comply without the need for further litigation and delay through compliance proceedings. Therefore, we order that the District compensate first and second grade teachers who were affected by the change (including those teachers at Oka School) by the amount of time off or money that will compensate them for an additional 45 minutes of work performed per day. We arrive at this figure based on the undisputed additional 30 minutes per day the teachers were required to teach, plus an extra 15 minutes for the added preparation time necessitated by the extra instructional time. The latter amount is based solely on the evidence in this case, and the ALJ's conclusion that the ratio of instructional time to noninstructional time is two to one. It is not intended as a statement as to the appropriate amount of preparation time in relation to instructional time.

The parties shall be directed to meet in an attempt to agree upon the manner and method of compensation, whether it be time off, back pay or some combination of both. The manner and method of compensation shall be fair and reasonable, taking into account teacher preference as well as the avoidance of an undue burden upon District finances and operations. Interest shall be paid on all monetary compensation at the rate of ten

percent per annum. Should the parties not reach agreement within 60 calendar days of the date of this Decision, the District shall immediately notify the Los Angeles Regional Director so that compliance proceedings may be initiated. Further, employees who are entitled to compensation but who are no longer employed by the District shall receive monetary compensation plus interest at the rate of ten percent per annum.

ORDER

Upon the foregoing conclusions of law, including those attached hereto in the Proposed Decision, and on the entire record of this case, it is found that the Fountain Valley Elementary School District has violated section 3543.5(c) and, derivatively, section 3543.5(a) and (b) of the Educational Employment Relations Act. Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

A. Taking unilateral action through repudiation of the terms of the lawful collective bargaining agreement.

B. Interfering with the right of the employees to be represented in their employment relations with the employee organization of their choice.

C. Interfering with the right of the exclusive representative to represent the members of the bargaining unit in their employment relations with their employer.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

A. For the period from the effective date of the District's unlawful unilateral action to the effective date of the parties' subsequent collective bargaining agreement, April 23, 1986, grant to each first and second grade teacher required to teach more than the 1250 minutes per week provided in the agreement then in force the amount of time off or salary which equates to 45 minutes per day of compensation. The manner and method of compensation shall be determined by mutual agreement of the parties. Those teachers eligible for compensation but no longer in the employ of the District shall receive monetary compensation. If the parties do not reach agreement within 60 calendar days from the date of this Decision, the District shall immediately notify the Los Angeles Regional Director of the Public Employment Relations Board so that compliance proceedings may be initiated. Any monetary payment shall include interest at the rate of ten (10) percent per annum.

B. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all school sites and all other work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of

thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

C. Upon issuance of this Decision, written notification of the actions taken to comply with this Order shall be made to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his instructions.

Chairperson Hesse and Member Craib joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-2040, Fountain Valley Education Association, CTA/NEA v. Fountain Valley Elementary School District, in which all parties had the right to participate, it has been found that the Fountain Valley Elementary School District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act. The District violated the Act by unilaterally increasing the number of instructional minutes required to be taught at the first and second grade levels, contrary to the terms of the collective bargaining agreement then in effect. By unilaterally changing the number of instructional minutes required to be taught at the first and second grade levels, the District derivatively denied the employees their right to be represented in their employment relations by the employee organization of their own choosing, and denied to the exclusive representative the right to represent bargaining unit employees in their employment relations with their employer.

As a result of this conduct, we have been ordered to post this Notice and will abide by the following. We will:

1. CEASE AND DESIST FROM:

A. Taking unilateral action through repudiation of the terms of the lawful collective bargaining agreement.

B. Interfering with the right of the employees to be represented in their employment relations with the employee organization of their choice.

C. Interfering with the right of the exclusive representative to represent the members of the bargaining unit in their employment relations with their employer.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

A. Grant to each teacher required to teach more than 1250 minutes the amount of time off or salary which equates to 45 minutes of compensation. Any monetary payment shall include interest at the rate of ten (10) percent per annum.

Dated: _____ FOUNTAIN VALLEY ELEMENTARY SCHOOL DISTRICT

By: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

FOUNTAIN VALLEY EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Unfair Practice Case No. LA-CE-2040
v.	)	
FOUNTAIN VALLEY ELEMENTARY SCHOOL DISTRICT,	)	PROPOSED DECISION (3/27/85)
Respondent.	)	

Appearances; A. Eugene Huguenin (California Teachers Association) Attorney for Fountain Valley Education Association, CTA/NEA; and Margaret Chidester (Parker & Covert) Attorney for Fountain Valley Elementary School District.

Before Barbara E. Miller, Administrative Law Judge.

I. PROCEDURAL HISTORY

The Fountain Valley Education Association, CTA/NEA (hereinafter Association, FVEA, or Charging Party) and the Fountain Valley Elementary School District (hereinafter District or Respondent) are parties to a collective bargaining agreement which establishes that the school year will consist of 175 instructional days and further establishes that teachers for grade levels one and two are required to teach 1250 minutes per week. On August 20, 1984, the Respondent's governing board took action increasing the District's number of instructional days for the 1984-85 school year to 180 days and increasing the number of instructional minutes taught by teachers at grade

levels one and two to 1400 minutes per week. In response to that action, on August 29, 1984, the Fountain Valley Education Association filed an Unfair Practice Charge against the District.

An investigation was conducted and on September 14, 1984, a Complaint issued alleging that the Respondent's action of August 20 constituted a violation of sections 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA).[1] On October 5, 1984, the District filed its Answer admitting that the student instructional time for grades one and two had been increased to 1400 minutes per week, but denying all other material allegations in the Complaint. In its Answer, the Respondent affirmatively alleges that it gave FVEA notice and an opportunity to negotiate prior to the alleged changes on

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[1]The EERA is codified beginning at Government Code section 3540, etc. Unless otherwise indicated, all statutory references are to the Government Code. Section 3543.5 of the EERA provides, in relevant part, as follows:

> It shall be unlawful for the public school employer to:
>
> a) Impose of threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

August 20, 1984, but that FVEA had refused to bargain in good faith. Moreover, the Answer alleges that the collective bargaining agreement did not constitute a waiver of the District's right to institute unilateral changes after giving FVEA an opportunity to meet and negotiate.

An informal conference was conducted on September 18, 1984, and when the parties were unable to resolve their dispute, a formal hearing was scheduled and conducted on November 6 and 7, 1984, at the Los Angeles Regional Office of the Public Employment Relations Board (hereinafter PERB or Board.) Post-hearing briefs were timely filed and on February 19, 1985, the case was submitted for proposed decision.

II. FINDINGS OF FACT

The Fountain Valley Education Association and the Fountain Valley Elementary School District are, respectively, an employee organization and an employer as those terms are defined in the EERA. The FVEA is the exclusive representative of the District's unit of certificated employees and on October 21, 1982, the parties ratified a collective bargaining agreement which, by its terms, is effective from July 1, 1982 through June 30, 1985.

Article VI of that collective bargaining agreement is entitled "Hours of Employment" and provides, in relevant part, as follows:

> A. Bargaining unit members shall work the following number of days:

175 instructional days

. . . . . .

D. Bargaining unit members shall not be required to provide instruction for more than the following number of minutes per full five-day week (exclusive of lunch, breaks, etc.):

Levels K	1200 minutes
Levels 1-2	1250 minutes
Levels 3-8	1550 minutes

There is no dispute that prior to the action complained of herein, bargaining unit members worked 175 instructional days and bargaining unit members teaching grade levels one and two were required to teach 1250 minutes per week. There is also no dispute that at Oka School in 1983-84, teachers voluntarily worked 37 additional instructional minutes per day. Finally, there is no dispute that subsequent to the actions complained of herein, teachers at grade levels one and two were required to provide 1400 minutes of instruction per five-day week.

The collective bargaining agreement also contains an article entitled "District Rights." That article provides, in relevant part, as follows:

> A. It is understood and agreed that the District retains all of its powers and authority to direct, manage, and control to the full extent of the law. Included in, but not limited to, those duties and powers are the exclusive right to: determine its organization; direct the work of its bargaining unit members; determine the times and hours of operation; determine the kinds and levels of services to be provided, and the methods and means of providing them;

> establish its educational policies, goals, and objectives; insure the rights and educational opportunities of students; . . .
>
> B. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the District, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this agreement, and then only to the extent such specific and express terms are in conformance with law.

The contract also contains Article XVII entitled "Support of Agreement." That section provides, as follows:

> The District and the Association agree that it is to their mutual benefit to encourage the resolution of differences through the meet and negotiation process. Therefore, it is agreed that the Association will support this Agreement for its term and will not appear before public bodies meeting in their official capacity that are elected or appointed to seek change or improvement in any matter subject to the meet and negotiation process except by mutual agreement of the District and the Association.

Finally, Article XVIII is entitled "Completion of Meet and Negotiation" and provides:

> Except where specifically stated, during the term of this Agreement, the Association and the District expressly waive and relinquish the right to meet and negotiate and agrees [sic] that the District shall not be obligated to meet and negotiate with respect to any subject no matter whether referred to or covered in this Agreement or not, even though each subject or matter may not have been within the knowledge or contemplation of either or both the District or the

> Association at the time they met and negotiated on and executed this Agreement, and even though such subjects or matters were proposed and later withdrawn.

Neither party presented any evidence as to Article XVII or XVIII and it is not clear what the parties intended when they agreed that only the union would not lobby for changes and only the District would not be obligated to negotiate. Whatever the parties intended, based upon the contract language, it is found that they expressly agreed to be bound by the terms of the contract unless there was mutual agreement to modify its terms.

B. SB 813

The Hughes-Hart Educational Reform Act of 1983, frequently referred to as Senate Bill or SB 813, added sections 46200-46204 to the Education Code. Those sections became effective on July 28, 1983, and provide monetary incentives to school districts which establish a longer instructional day and year. Education Code section 46200 provides that school districts will be given an extra $35.00 per unit of average daily attendance if the District certifies to the Superintendent of Public Instruction that it offered 180 days or more of instruction for the school year 1984-85.

Education Code section 46201 is somewhat more complex and provides as follows:

> Apportionment for Schools Offering Specified Amount of Instructional Time; Reduction of Base Revenue Limit for Subsequent Decrease in Time

> (a) In each of the 1984-85, 1985-86, and 1986-87 fiscal years, for each school district which certifies to the Superintendent of Public Instruction that it offers at least the amount of instructional time specified in this subdivision, the Superintendent of Public Instruction shall apportion twenty dollars ($20.00) per unit of average daily attendance in kindergarten and grades one through eight, . . .

The section goes on to provide that by the 1986-87 fiscal year, a district has to provide 50,400 minutes of instruction in grades one to three, inclusive. In order to receive financial incentives in 1984-85, if a district provides less than 50,400 minutes of instruction for grades one through three, in 1984-85 it has to offer the instructional minutes offered in 1982-83, plus one-third of the difference between the number of minutes specified in the section, namely 50,400 and the number offered in 1982-83.

In terms of the instant unfair practice proceeding and the Fountain Valley Elementary School District, in order to qualify for incentive monies under Education Code section 46201, in 1984-85 the District needed to add ten minutes of instruction for students in grade levels one and two, if 180 days of instruction were provided. In other categories or levels of instruction, the District already met the goals set forth in the Education Code.

On August 20, 1984, the District's governing board took action to lengthen the instructional day and the instructional year for the Fountain Valley School District. Although opposed

by the Association, the District took action to increase the length of the instructional year from 175 days to 180 days. The action by the governing board on August 20, 1984 was unanimous and was characterized as the adoption of a student calendar which provided for 180 days of instruction.

At the same meeting on August 20, 1984, the governing board took action to require that teachers in grades one and two provide an additional 30 minutes per day of instruction for their students, 20 minutes more than required to receive SB 813 incentive money. This action was opposed by the Association and by one board member who drew a distinction between the increase in the student instructional days per year and the action which specifically required additional instructional time from the teachers. Board member Carol Mohan sided with the Association and considered the action of increasing the number of instructional minutes to be a repudiation of the collective bargaining agreement.

C. The District's Defense

The District does not deny that it increased the student calendar to 180 days of instruction. Moreover, the District admits that it required teachers at grade levels one and two to teach an average of an additional 30 minutes per day. The District also admits that there was no agreement with the Association at the time the aforementioned changes were instituted.

Ironically, the District takes the position that it could not require teachers to teach 180 days because such an action would violate the parties' collective bargaining agreement. The District plans to use management personnel, certificated volunteers or substitutes for the additional five days in June 1985, if prior agreement with FVEA is not achieved. In terms of the longer instructional day, however, the District claims it was not educationally sound or administratively feasible to bring in a different teacher 30 minutes a day. Accordingly, the minutes set forth in the contract had to be exceeded in order to receive the SB 813 incentive money.

In its defense, the District further asserts that it attempted to negotiate the longer day and year with FVEA, but FVEA refused to bargain in good faith. Moreover, the District further argues that it did not contemplate the passage of SB 813 when it negotiated the 1982-83 collective bargaining agreement and, accordingly, it did not waive its right to unilaterally increase the length of the school day or the school year pursuant to the District Rights provision of the contract.

In further support of its defense, the District proposed to introduce evidence regarding its numerous attempts to bargain with FVEA on the longer day and longer year. Although some testimonial and documentary evidence was presented with respect to the District's defense, during the course of the hearing,

the undersigned determined that much of the evidence was irrelevant. Accordingly, the District was given an opportunity to make an offer of proof regarding the testimony which would be elicited if the District were permitted to fully present its defense. For purposes of discussion, some aspects of that defense are outlined below. It must be noted, however, that if evidence regarding the District's defense is deemed relevant, the hearing will have to be reconvened in order to give the Charging Party an opportunity to rebut the District's evidence or to cross examine the District's witnesses.

FVEA and the District did not conclude salary negotiations for the 1983-84 school year until November of 1983. On February 17, 1984, the Association sunshined its salary proposal for 1984-85. Thereafter, on May 3, 1984, the District sunshined its initial proposal for a longer day, longer year. This proposal was sunshined notwithstanding previous comments by representatives of FVEA that FVEA was under no obligation to bargain longer day and longer year, and would not consider doing so until the issue of salaries had been resolved. The District did not hold a public hearing on its salary proposal until June 7, 1984. In summary, FVEA was prepared to negotiate salary early in 1984 pursuant to the salary repoener provision in the parties' contract. The District's priority, however, was on negotiating the longer day and longer year.

If allowed to testify District witnesses would have stated that from May 3 through August, the District repeatedly made

attempts to get FVEA to negotiate regarding the longer day and longer year. At all times relevant hereto, FVEA indicated that it would not consider negotiating the longer day or longer year until the question of salaries had been resolved. FVEA further indicated that it was either illegal or inappropriate for the District to attempt bargaining the longer day and longer year or to condition salary negotiations on negotiations on those matters. In an exchange of letters, the District indicated that it was prepared to negotiate on the longer day and longer year and the Association responded that it was prepared to negotiate on salary. Given the evidence presented, the undersigned finds that up to and including June 8, 1984, the District was not prepared to bargain salary as a separate issue, first because its proposal was not sunshined until June 7 and then because it conditioned salary negotiations on the Association's agreement to negotiate the longer day and longer year.[2]

Thereafter, if allowed to testify, District witnesses would have stated that the Association failed and refused to make its representatives available for salary negotiations until

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[2]The District claims it did not sunshine its salary proposal earlier because the status of its budget and State funding were unclear. Nevertheless, based upon the testimony of Association witnesses and Robert Sampica, Administrator - Personnel Services, it is found that the District unnecessarily delayed salary negotiations and tried to link bargaining on that mandatory subject with bargaining on the subject of the longer day and year.

August 7, 1985. Robert Sampica, the District's administrator for Personnel Services, and Pamela Rice, the Director, Business Services, tried in vain to get Association representatives to the table so that the District could expedite salary negotiations and then turn to the subject of the longer day and longer year. Even after the Association and the District reached impasse on the issue of salaries, the Association refused to bargain about the longer day and longer year and without discussion, repeatedly rejected the District's offers. Apparently because discussion of the school calendar also embraced the subject of the extended school year, the District's attempts to discuss that issue were also unproductive.

D. The Impact of the District's Changes

1. The Longer Day

The Association presented several witnesses who teach grade levels one or two or a combination of one and two. Each witness described the way in which 30 additional minutes of instruction each day had impacted upon their work schedule and the time spent outside the regular workday preparing for work.

During the 1983-84 school year, Katherine Wright taught first grade at the Fulton School. In 1984-85 she teaches a first and second grade combination at Arevalos School. Wright testified that in 1983-84, she spent most of her duty-free time performing functions related to her teaching responsibilities.

Wright worked the 30 minutes before students arrived each day, worked through her recess, her lunch hour, and during the period of time after her class was dismissed until she was able to leave school, when the eighth grade class was dismissed. Wright testified that in 1982-83 she was frequently unable to finish her required assignments while at the school and found it necessary to take work home once or twice a week.

In 1984-85, Wright testified that her workload increased tremendously. She testified that the additional 30 minutes of instruction were added to her afternoon sessions with her first and second graders. Although she covered the same subject areas as she had covered in previous years, preparation for those subjects was greatly increased. In short, Wright testified that she spent one and one-half to two hours more per day working outside the framework of the regular school day than she had spent in 1983-84. Wright did testify that 15 to 30 minutes of that time was attributable to the fact that she was teaching a first and second grade combination. Accordingly, Wright testified that she worked one to one and one-half hours more each day than she had worked in 1983-84 and the increase was attributable to the 30 additional instructional minutes in 1984-85. Given Wright's description of what is involved, there is no basis for questioning her time estimates.

Yvonne Hart also testified for the Association. Hart taught students in the second grade at Newland School in

1983-84 and continued in that assignment in 1984-85. During the 1983-84 school year Hart was required to be at school at 7:55 a.m. and she was able to leave at 3:00 p.m. Pursuant to the parties' collective bargaining contract she had a 45 minute duty-free lunch. For the 1984-85 school year Hart is required to teach approximately 38 additional minutes per day, four days a week. She testified that in the current school year, she spends between 40 minutes to an hour a day longer than she did in the previous year, working outside the framework of the regular school day. The additional time in 1984-85 is a combination of the time needed to prepare and evaluate work for the additional instructional time and the time previously used for preparation which is now taken up by instruction.

Miriam Spencer was also called as a witness on behalf of FVEA. Spencer teaches the first grade at James Cox School. She had the same assignment in 1983-84. Although Spencer's testimony was somewhat confused during cross-examination, based upon her overall testimony, it is concluded that she works at least 45 additional minutes of her own time each school day as a result of the District's required increase in instructional time. In addition to finding it necessary to work at least 15 minutes of her duty-free lunch hour, Spencer spends between 30 minutes a day to six hours a week working at home, in addition to what she did the previous year.

Finally, Barbara Heffner, a first grade teacher at Newland School, testified that the increase in instructional time

requires her to work, on the average, 30 additional minutes of her own time at the school site, an additional 20 to 30 minutes at home, four nights a week, and some additional work on weekends.

All FVEA witnesses were questioned as to whether the additional time, for preparing work and evaluating the work of their students was actually "required" by the District. Spencer's testimony summarizes the sentiments conveyed by each of the FVEA witnesses. She stated:

> As a professional person and I have a commitment to the students that I work with, I have a commitment to their parents to provide a good program and I cannot possibly provide that without the proper amount of time spent in planning and evaluating the type of work that they are doing. I need to report to parents and do report cards and I have no knowledge of that if I do not look at a student's work and the product they are turning in to me to properly evaluate how they are progressing and how I can further plan for them.

Although only the four witnesses testified for FVEA, Black and Hart testified that they had discussed the issue of the longer day with other teachers who also noted that they were required to work longer hours and take more work home with them at the end of the school day. In addition, the District's own witnesses acknowledged that 30 additional instructional minutes would take some additional preparation time. Although District witnesses did not concur with the Association witnesses as to the amount of time required as a result of the additional 30

minutes of instruction, Catherine Follett, the principal of Oka School said it would require an additional 15 minutes of preparation. Her testimony was echoed by that of Ed Lavelle, the principal of Arevalos School.

2. The Longer Year

Several Association witnesses testified that they anticipated that the District was going to require their services for 180 days of instruction. For example, Kathy Wright testified that her principal, Ed Lavelle, had created a work schedule that went through June 20, 1985, and that she had responsibilities for each of the 180 days of instruction. Other witnesses, however, testified that they were uncertain as to whether they would be required to teach 180 or 175 days.

Upon questioning by the undersigned, some witnesses testified that they did not have a fixed program of study mapped out for each week of the school year so they had not yet planned instructional materials for 180 days. It should be noted, however, that most of the witnesses were from the first and second grade and it is not clear if teachers from the higher grade levels have a more rigid program of instruction and have been left in limbo as to the number of days for which preparation is required.

In any event, during the course of the formal hearing, the District's representatives and witnesses made it clear that the District does not plan to require regular certificated

personnel to teach more than 175 days. Instructional responsibilities for the last five days of the year are going to be absorbed by management personnel or certificated volunteers. They will provide students with five days of "enrichment."

III. ISSUES

A. Did the District unilaterally change a matter within the scope of representation governed by the parties' collective bargaining agreement?

B. Did the District have the authority, pursuant to the collective bargaining agreement or otherwise, to unilaterally increase instructional time after giving FVEA an opportunity to meet and negotiate?

IV. CONCLUSIONS OF LAW

A. Unilateral Changes in Matters Within the Scope of Representation and Governed by the Contract.

It is well settled that, absent special circumstances, an employer's unilateral action on a matter within the scope of representation is a per se violation of the EERA. San Mateo Community College District (6/8/79) PERB Decision No. 94; San Francisco Community College District (10/12/79) PERB Decision No. 105. In cases where the parties did not have the specific contractual provisions present here, the PERB has found that matters such as the school calendar, the starting and ending time of the certificated work year, and the placement of holidays are matters within the scope of

representation. Palos Verdes Peninsula Unified School District (7/16/79) PERB Decision No. 96; Oakland Unified School District (12/16/83) PERB Decision No. 367. Although those cases did not raise the question presented here, the District does not dispute the conclusion that the number of days teachers are required to work is a subject within the scope of representation.

Numerous PERB decisions have addressed the issue of whether an increase in instructional time or a decrease in preparation time constitutes a unilateral change on a matter within the scope of representation. It is well settled, and in this case the employer does not challenge the proposition, that changes in instructional time or preparation periods are within the scope of representation "to the extent that changes in available preparation time effect the length of the employee's workday or duty-free time." San Mateo City School District (5/20/80) PERB Decision No. 129 at 19; Modesto City Schools (3/8/83) PERB Decision No. 291.

In the instant case, there can be no legitimate dispute that, if the changes were made, the changes constitute a repudiation of the contract. Pursuant to section 3540.l(h) of the EERA, collective bargaining agreements are binding upon the public school employer and the exclusive representative. Moreover, pursuant to the PERB's decision in Grant Joint Union High School District (2/26/82) PERB Decision No. 196 and Chico

Unified School District (2/22/83) PERB Decision No. 286, a charging party establishes a violation of the EERA if it proves that an employer breached or otherwise altered a collective bargaining agreement and that the breach amounted to a change of policy that had a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members.

1. The Longer Year

Although there is no dispute that the EERA would be violated if the employer unilaterally required the teachers to teach five additional days per year, in the instant case it is found that the District did not impose such a requirement. At the hearing, the District took the official position that no certificated employee in the bargaining unit would be required to teach more days than the 175 specified in the contract. Moreover, when the governing board adopted the school calendar, it identified it as the student calendar. As noted above, board member Mohan made a distinction between the longer year and the longer day because only the latter specified that teachers would be required to teach and, therefore, constituted a clear repudiation of the contractual limitations.

Although District negotiators consistently lumped together the concept of the longer day and the longer year and although District principals led some teachers to believe that they would be required to teach 180 days, the misunderstandings

which resulted from those actions do not override the position taken by the District. Although the actions of District administrators which led to those misunderstandings might tend to undermine the position of the Association, there is no reason to conclude that the misunderstanding would not have been rectified if the Association had simply asked the District questions regarding its intentions with respect to the 180 day student calendar. Accordingly, based upon the evidence presented, it cannot be concluded, at this point in time, that the District has violated the Act with respect to the longer instructional year for students. See San Jose Community College District (9/30/82) PERB Decision No. 240.[3]

2. The Longer Day

Distinguished from the issue of the longer year, there can be no dispute that, absent a viable defense, requiring teachers to teach an average of 30 extra instructional minutes a day constitutes a violation of the contract and a violation of the EERA. Absent a contract provision specifying the amount of preparation or instructional time required, the Board has held

[3]Since the District has stated that it plans to use management personnel to teach the last five days of the school year, this case does raise a question regarding the propriety of the transfer of bargaining unit work. See Mt. San Antonio Community College District (8/18/83) PERB Decision No. 334. This issue, however, was not raised by either party during the course of the hearing or in their briefs. Given that the issue and the facts relevant to it were not fully litigated, no conclusions will be reached in this proposed decision.

that the charging party must present evidence that a change in the allocation of instructional or preparation time within the school day affects the length of the employee's workday or duty-free time. Modesto City Schools, supra. In the instant case, it is found that FVEA presented sufficient evidence to establish that the 30 minute a day increase in instructional time had an impact on employee's duty-free time. Black, Hart, Spencer, and Heffner all testified that, at a minimum, an average of 45 minutes of their free time, each day, is now allocated to instruction related activities.

In the instant case, however, it is found that it was unnecessary for the Charging Party to establish an actual impact on the length of the school day or the amount of duty-free time involved in order to establish a violation of the EERA. Where, as here, the contract is repudiated and the repudiation is not an isolated incident, the Act is violated and no further showing should be required.

B. Was the District's Action Justified by the Contract or Public Policy Considerations.

Throughout the hearings and in an extensive post-hearing brief, the Respondent has argued that its action in increasing the length of the school day was necessary in order to receive the incentive monies offered by SB 813. The District argues that when the collective bargaining contract was negotiated, it did not contemplate the passage of SB 813 and, accordingly, it did not "clearly and unmistakably" waive its right to initiate

negotiations on a matter within the scope of representation. Accordingly, the Respondent argues that its action was justified by the collective bargaining agreement and by some higher authority which mandates that the District oversee the educational needs of the students. Finally, the Respondent maintains that it did not act unilaterally, in the way that term is ordinarily used. The Respondent alleges that it gave the Charging Party notice of its proposed action and an opportunity to negotiate and that the Respondent only acted after the Charging Party refused to discuss the issues of longer day and year.

Although some observers might conclude that FVEA was not sufficiently sensitive to the alleged needs of the District and its students, the District's argument is without logical, legal, or factual support. Although it is true that the parties did not enter into the collective bargaining agreement contemplating the passage of SB 813, the District has consistently failed to address the fact that it agreed in its binding contract, to a specified number of minutes as the instructional responsibility of first and second grade teachers.

Throughout this proceeding, the District has asserted its right pursuant to the contract to "determine the times and hours of operation" and to "determine the kinds and level of services to be provided." The District, however, seems to ignore the fact that it limited its rights when it agreed that

the exercise of those rights would be "limited only by the specific and express terms of this agreement, . . ." Based upon the language in the contract itself, the District did not have the authority to increase the number of minutes of teaching time required of first and second grade teachers.

Although PERB has considered few cases where the contract repudiation is as clear as it is in the instant case, PERB has held that the terms of a collective bargaining agreement, once agreed upon, "constitute a waiver for the term of the agreement of the right to bargain over issues expressly covered therein." Mt. Diablo Unified School District (12/30/83) PERB Decision No. 373 at 47. The District fails to address either Mt. Diablo or the provision of its contract which provides that, during the contract term, the Association and the District expressly waive and relinquish the right to meet and negotiate. Thus, according to PERB precedent and the parties' contract, the District's argument is unpersuasive; the fact that FVEA was given an opportunity to negotiate regarding the longer day and year is irrelevant and does not sanction the employer's actions because FVEA had no duty to negotiate and, at all times relevant herein, FVEA refused to negotiate.

The District's arguments are misplaced in other respects as well. For example, the District argues that the Association's bad faith bargaining on the issue of salaries gave the District the prerogative to unilaterally take action with respect to the

length of the school day. That argument is advanced despite the fact that the District never filed an unfair practice charge against the Association. Although such a defense might have some place in an action by FVEA alleging a unilateral change in salaries, it has no place in the instant proceeding.

In addition to concluding that PERB precedent and the parties' contract do not support the Respondent's position, it should be noted that the Respondent's attempt to saddle the Charging Party with responsibility for delays in negotiations is not supported by the record. SB 813 became effective on July 28, 1983. Although the extent to which the legislation would be funded was not entirely clear, nothing precluded the Respondent from approaching the Charging Party about contingency plans before the spring of 1984. Similarly, although the District claims that the status of its budget and the status of state funding prevented it from entering into salary negotiations as required by the contract, nothing precluded contingency negotiations on that issue. Indeed, the Charging Party submitted its salary proposal on February 17, 1984, and the District did not sunshine and conduct a public hearing on its proposal until June 7, 1984. Thus, four months of potential negotiations were lost. Moreover, even after the District sunshined its proposal, it initially failed to negotiate salaries separately and impermissibly tied negotiations on salary to negotiations on the longer day and year, a subject the Association was not required to negotiate.

Finally, before concluding the discussion of the merits of the Respondent's position, it is appropriate to review private sector authorities to see if there are cases which support the Respondent's position that it can repudiate its contract provided it gives the union notice and an opportunity to negotiate. The California courts and PERB itself have long held that reference to such cases may be helpful in resolving questions which arise under state labor law statutes. Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608; Novato Unified School District (4/30/82) PERB Decision No. 210. Although the EERA does not contain a section comparable to section 8(d) of the NLRA, 29 USC 158(d), a review of cases arising under the NLRA is still instructive.[4]

The Respondent cites Strut her Wells Corp. v. NLRB (10th Cir. 1983) 721 F.2d. 465 [114 LRRM 3553] in support of its position herein. That reliance is misplaced. In Struther Wells the Court held that the employer was under no obligation to provide a cost-of-living adjustment because that benefit did not survive the expiration of the parties' collective bargaining agreement. In dicta the Court indicated that even if the benefit survived the expired contract, the employer could make changes after it had given the union notice and an

[4]The NLRA provides that when a collective bargaining agreement is in effect, no party can terminate or modify it unless certain procedures are followed.

opportunity to negotiate. Clearly, the case described by the 10th Circuit is not comparable to the instant unfair practice proceeding. Here we are not talking about an expired contract.

The cases relied upon by the Charging Party are more on point. In C & S Industries (1966) 158 NLRB 454 [62 LRRM 1043], the NLRB considered a case where the argument was made that the employer offered to bargain with the union before it implemented a wage incentive program during the term of the contract which prohibited changes in the method of paying employees without prior negotiations and the written consent of the union. In rejecting the employer's argument, the Board noted:

> [A]ssuming that Respondent made a sufficient offer to bargain regarding the wage incentive system, we reject the premise of Respondent's argument that one party to an existing contract may during its term unilaterally institute a change in contract terms after it has offered to bargain regarding the change and the other party has refused to discuss the matter.
>
> It is true, of course, that where during timely negotiations for a new agreement an employer has offered to bargain with a union concerning a proposed change in contract conditions and the union has refused to bargain, the employer does not violate his statutory obligation if following the effective period of the expiring contract, he unilaterally institutes the change. The situation is different, however, where, as here, an employer seeks to modify during the life of an existing contract terms and conditions of employment embodied in the contract and made effective for its term. In the latter situation, a bargain having

> already been struck for the contract period and reduced to writing, neither party is required under the statute to bargain anew about the matters the contract has settled for its duration, and the employer is no longer free to modify the contract over the objection of the Union. Id. at 456-457. (Emphasis added.)

See also, Dunham Bush, Inc. (1982) 264 NLRB 1347 [111 LRRM 1389].

Finally, it must be noted that the District makes no attempt to argue that it had a right to repudiate the contract because of any compelling statutory reason or business necessity. The Respondent recognized that the Education Code provisions enacted by SB 813 did not mandate any changes for the school year 1984-85. What the Respondent failed to recognize is the heavy burden it must bear if it wishes to repudiate a collective bargaining agreement. PERB will not sanction unilateral changes when statutes give the employer discretion. See, Holtville Unified School District (9/30/82) PERB Decision No. 250. Moreover, the California Supreme Court has specifically recognized that legislation which impairs a parties contractual obligations must be carefully scrutinized. In Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296, the Supreme Court considered the constitutionality of legislation which required local agencies to repudiate their collective bargaining agreements in order to receive state funding. Recognizing that the legislation was enacted after the passage of Proposition 13, a period when the

Legislature thought that the entire state was facing a grave financial crisis, the Court nevertheless noted:

> Since the statute accomplishes a severe impairment of petitioners' contractual rights, the "height of the hurdle the state legislation must clear" is elevated and "a careful examination of . . . [its] nature and purpose" is required.
>
> . . . . . .
>
> [R]espondents have clearly failed to satisfy their threshold burden of demonstrating that the substantial abridgement of petitioners' contract rights to an increase in wages was warranted by a grave financial crisis, and they advance no other justification for the impairment.
>
> Thus we conclude that the provision of [Government Code] section 16280 which invalidates agreements granting cost-of-living wage increases to local public agency employees is invalid as an impairment of contract in violation of both the state and federal Constitutions. Id. at 309 and 313-14. (Citations and footnotes omitted.)

If contract repudiation is not permissible under the conditions that prevailed in 1978-79 after the passage of Proposition 13, it is readily apparent that contract repudiation cannot be sanctioned when the legislation used as a basis for the repudiation does not compel such a result and when the breaching party offers no compelling financial or educational reason for its actions.

Based upon a review of the authorities and the evidence presented, the District has failed to establish a viable

defense to its repudiation of the collective bargaining agreement and the Charging Party has established a violation of the EERA.

V. CONCLUSION

Based upon the entire record of these proceedings, it is concluded that the District unilaterally increased the length of the school day for teachers teaching grade levels one and two and that such action violated section 3543.5(c) of the EERA. In unilaterally repudiating the parties' collective bargaining agreement and changing a matter within the scope of representation, the District concurrently violated sections 3543.5(a) and (b). San Francisco Community College District (10/12/79) PERB Decision No. 105. It is also found, based upon the entire record in these proceedings that the District did not unilaterally increase the length of the school year for teachers although it did make such a change for students. Since the increase in the length of the school year for students does not, by itself, constitute a violation of the EERA, that aspect of the Charge/Complaint, should be dismissed.

VI. REMEDY

The most difficult aspect of the current case is trying to fashion the appropriate remedy. In a unilateral change case, it is standard practice to order the employer to cease and desist from its unlawful action, to restore the status quo ante, and to make employees whole for any damage they have

suffered as a result of the unlawful unilateral change. Rio Hondo Community College District (3/8/83) PERB Decision No. 292.

In the instant proceeding, if the parties have not previously reached agreement, upon request of the Association, the employer should be required to restore the conditions which existed prior to its unlawful action. Accordingly, the District should be permitted to require only 1250 minutes of teaching per week from first and second grade teachers. However, in order to avoid the mid-semester disruption of student schedules, the status quo shall be restored effective the next full semester following issuance of this order. In other words, if or when the parties negotiate for a new collective bargaining agreement, it should be understood that they are bargaining from the position of 1250 minutes a week of instruction for first and second grade teachers.

It is also standard in a unilateral change case to order the employer to bargain with the union about the matter(s) at issue. In the instant proceeding, however, since it has been found that FVEA has no obligation to bargain about the matter at issue, it would be inappropriate to require bargaining." Accordingly, unless FVEA wants to bargain about the longer day or unless the parties make a timely demand to open negotiations on a new collective bargaining agreement, negotiations will not be required as part of this order.

It is also typical in a unilateral change case to make employees whole for any monetary losses incurred by them as a

result of the employer's unlawful conduct. In Corning Union High School District (8/17/84) PERB Decision No. 399, a case in which PERB found that a school district had unlawfully eliminated the preparation period for certain teachers, PERB issued a remedial order which had two alternative methods of compensating those affected by the district's action. The Board ordered the district to compensate the affected employees by giving them paid time off work "which comports with the number of extra hours each employee actually worked." In the alternative, the Board ordered that if the district and the employee organization were unable to agree on the manner in which the time off would be granted, "the employees concerning whom there is no agreement shall receive monetary compensation commensurate with the extra hours worked."

In concept, there is no problem with applying the Corning remedy in the instant case. In order to more fully effectuate the purposes of the EERA, however, it is found that the remedy should be modified in several respects. In the present case, the collective bargaining contract established the number of instructional minutes that the District could require of first and second grade teachers. Having established a violation of the contract, the Charging Party should not be required to establish any further actual harm to individual employees. Accordingly, at a minimum, the District should be required to give each affected employee at least the equivalent of 30

minutes a day paid time off work or monetary compensation commensurate with the 30 extra minutes of instruction each day, through the date when the District restores the status quo or the parties otherwise reach agreement. Employees no longer employed by the District will, of course, get monetary compensation. Moreover, whenever monetary compensation is provided, it should include interest at the rate of ten (10) percent per annum.

Nothing said above should be construed as a finding that the affected employees are only entitled to 30 minutes a day of compensatory time off or compensation; the 30 minutes is a minimum. Whether employees are entitled to additional compensation is a matter which should be left to the parties for resolution or to a compliance hearing if the parties are unable to reach agreement. In order to guide the parties and/or a hearing officer, however, the undersigned makes the following observation. Based upon the testimony of all the witnesses, it is found that, during the course of their workday, first and second grade teachers had approximately one minute of non-instructional time for every two minutes of instructional time, excluding the duty-free lunch. In order to maintain that ratio, teachers who were required to teach an average of 30 additional minutes per day should get 45 minutes of paid non-instructional time.

Finally, it should be noted that nothing herein should deprive the teachers at Oka School from receiving the same make

whole remedy afforded to other employees. Although nothing precludes the parties from agreeing to a different result, it is found that the teachers at Oka School volunteered for additional instructional time in 1983-84. In 1984-85, the year at issue in this proceeding, like other teachers in the District, they were forced to provide instruction above the limits established in the contract.

It also is appropriate that the employer be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the employer indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the employer has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the Act that employees be informed of the resolution of the controversy and will announce the employer's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69; Pandol and Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 580, 587; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to EERA section 3541.5(c), it is hereby ORDERED that the Fountain

Valley Elementary School District, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

(A) Taking unilateral actions to repudiate the binding collective bargaining contract between the Fountain Valley Education Association and the Fountain Valley Elementary School District by requiring teachers to provide 1400 minutes per week of instruction to students at grade levels one and two;

(B) Denying the Fountain Valley Education Association the right to represent employees by unilaterally repudiating the parties collective bargaining agreement with respect to the amount of instructional time required of teachers at grade levels one and two;

(C) Interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act by unilaterally repudiating the contract negotiated by the Fountain Valley Education Association and the District.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(A) Upon completion of the school semester during which this order becomes final, reinstate the instructional program in effect prior to the 1984-85 school year so that no teacher providing instruction for grade levels one and two is required to teach more than 1250 minutes per week, until such time as the parties are required to negotiate or elect to

negotiate and reach agreement or negotiate through completion of the statutory impasse procedure concerning the subject matter of the unilateral change. However, the status quo ante shall not be restored if, subsequent to the District's actions, the parties, have, on their own initiative, reached agreement or negotiated through completion of the impasse procedure concerning instructional time for first and second grade teachers.

(B) Grant to each employee required to teach more than the 1250 minutes provided in the contract the amount of time off which corresponds to the number of additional instructional minutes taught or, if agreement cannot be reached as to the manner in which to grant such time off or if an individual is no longer in the District's employ, monetary compensation commensurate with the additional minutes worked. Any monetary payment shall include interest at the rate of ten (10) percent per annum.

(C) Grant to each employee harmed by the repudiation of the contract the amount of time off which corresponds to the number of extra minutes actually worked beyond the regular workday as a result of the District's unlawful action. Such time off is beyond the automatic amount provided for in paragraph (B) above. Should the parties fail to reach a satisfactory accord as to the manner in which such time off will be granted or if an individual is no longer in the

District's employ, then such employees will be granted monetary compensation commensurate with the additional hours actually worked. However, if subsequent to the District's unlawful action, the parties have, on their own initiative, reached agreement or negotiated through the completion of the statutory impasse procedure concerning these subjects, then liability for compensatory time off or back pay shall terminate at that point in time. Any monetary payment shall include interest at the rate of ten (10) percent per annum.

(D) Within ten (10) workdays from service of the final decision in this matter, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the notice attached hereto as an appendix. The notice must be signed by an authorized agent of the District indicating that the District will comply with the terms of this order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

(E) Upon issuance of a final decision, make written notification of the actions taken to comply with these orders to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his/her instructions.

IT IS FURTHER ORDERED all other allegations in the Charge and Complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on April 16, 1985, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on April 16, 1985, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: March 27, 1985

Barbara E. Miller
Administrative Law Judge